

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM SHANE JACKMAN,

Defendant-Appellant.

UNPUBLISHED

December 17, 2013

No. 307182

Wayne Circuit Court

LC No. 11-003517-FH

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of malicious destruction of property (MDOP) of more than \$1,000 but less than \$20,000, MCL 750.377a(1)(b)(i), and two counts of assault and battery, MCL 750.81. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 60 to 120 months in prison for the MDOP conviction and to time served for the assault convictions. We affirm.

Defendant's convictions arise from a confrontation between friends that led to defendant damaging Sara Ouillette's Ford Escape and subsequently assaulting two police officers in Dearborn, Michigan, on March 28, 2011. While defendant was staying in Justin Butka's home, defendant and Butka invited Ouillette, Megan Edwards, and two other men to come to the house. Ouillette and Edwards drove to the house in Ouillette's 2006 Ford Escape. In the basement, the group talked, played video games, and drank alcohol. Defendant and Ouillette eventually became involved in a confrontation and the parties ended up outside, where defendant used brick pavers to damage Ouillette's vehicle. When the police arrived, defendant gave a statement in which he said that he "took it out on [Ouillette's] car instead of her." The prosecution presented evidence that defendant caused more than \$4,000 in damages, including broken windows, a smashed windshield, a broken side view mirror, a damaged sunroof, and dents in the body of the vehicle. At trial, defendant admitted to damaging the windows and the windshield, but denied causing any damage to the body of the vehicle. Testimony indicated that when the police arrived, defendant fled into the house and went into a bathroom in the basement. Several police officers testified that defendant did not comply with an officer's command to exit the bathroom, and, instead, physically confronted two of the officers, including punching and kicking the officers. A third officer deployed a Taser in order to subdue defendant, who continued to be confrontational even after he was handcuffed. At trial, defendant denied assaulting any of the officers.

I. JURY NULLIFICATION

Defendant first argues that the trial court deprived him of his right to an attorney and his right to a fair trial by prohibiting defense counsel from asserting a jury-nullification defense during closing argument. We disagree. Although defendant raised this issue in a post-conviction motion for a new trial, he did not timely object or argue at trial that he had a right to present a jury-nullification argument. Accordingly, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In his opening statement, defense counsel acknowledged that defendant would testify that he damaged the windshield and windows on Ouillette's vehicle. Defendant subsequently testified that he broke the vehicle's windows. During defense counsel's closing argument, counsel acknowledged that defendant was guilty of at least MDOP of less than \$1,000. Counsel then began to argue that "even with the admissions that I made and even the admissions that [defendant] has made you're not obligated to find him guilty at all because a very key precept of our justice in this country" The trial court interrupted and prevented defense counsel from continuing with this jury-nullification argument.

The scope of closing argument is generally within the discretion of the trial court. *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009). Contrary to what defendant now argues, the trial court properly exercised its discretion by preventing defense counsel from advocating for jury nullification. "It shall be the duty of the judge to control all proceedings during the trial, and to limit . . . the argument of counsel to relevant and material matters, with a view to the . . . effective ascertainment of the truth regarding the matters involved." MCL 768.29. "Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence." *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). While a jury has the de facto power to exercise nullification, it does not have the right to do so. *Id.* at 207. Stated differently, jury nullification is not a recognized defense that a defendant is entitled to present. See *People v Bailey*, 451 Mich 657, 671 n 10; 549 NW2d 325, amended 453 Mich 1204 (1996); see also *Demers*, 195 Mich App at 206-208. Because the Legislature does not recognize jury nullification as a defense, defense counsel had no right to assert a jury-nullification defense at trial. Consequently, the trial court did not plainly err by precluding defense counsel's argument in this regard. We note that after continuing his closing argument, defense counsel was allowed to argue to the jury that it had "the right to find [defendant] not guilty of all of the counts and that's actually what I ask you to do." Defendant was not denied his right to a fair trial or right to counsel.

II. INDIVIDUALIZED SENTENCING

Defendant's remaining claims present various challenges to the validity of his sentence. Initially, defendant argues that the trial court failed to comply with the mandate of individualized sentencing, and instead improperly sentenced him in accordance with its own policy of maximizing sentences for defendants who have assaulted women. We disagree. Generally, the determination whether a sentence is valid or invalid is a question of law that this Court reviews de novo. See *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

Defendant correctly notes that sentences must be individualized and tailored to the circumstances of the defendant and the case. *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). Having reviewed the trial court's comments in their entirety, it is apparent that the court did not adopt its own arbitrary sentencing policy; nor did it abdicate its responsibility to individualize defendant's sentence, as defendant contends. Defendant provides only limited excerpts from the court's remarks in his appellate brief. Viewing the length and specificity of the trial court's remarks in their entirety, it is apparent that the court endeavored to fashion an individualized sentence that reflected defendant's particular conduct and criminal record. The court repeatedly referred to defendant by name and discussed his prior and current conduct with specificity. The court's observation that defendant had engaged in past conduct that involved aggression toward women on three separate occasions was not an attempt to avoid imposing an individualized sentence, but was simply the court's way of accurately setting forth the details of defendant's criminal record. The court never directly or indirectly gave any indication of any preference for maximizing the sentences of defendants who assault women. Furthermore, contrary to what defendant suggests, "[a] sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals." *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Defendant's sentence was individualized, and, accordingly, is not invalid on that basis.

Within this issue, defendant suggests that the trial court was biased, and that this Court should treat this claim as a motion to disqualify pursuant to MCR 2.003. Even if we employed such an analysis, this unpreserved claim would fail. See *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); see also *Carines*, 460 Mich at 763-764. As already noted, the basis of defendant's claim of bias—that the judge had a personal sentencing policy—is wholly unsubstantiated by the record. Further, despite defendant's claims, our review of the record shows that the judge's comments and opinions were formed on the basis of the facts introduced during the course of the proceedings and defendant's criminal record, as opposed to actual personal bias or prejudice against defendant. See *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Because defendant has failed to demonstrate any bias, let alone any bias that was extrajudicial or personal in origin, this claim is without merit.

III. UPWARD DEPARTURE

Defendant also argues that he is entitled to be resentenced because the trial court did not articulate substantial and compelling reasons for exceeding the minimum sentencing guidelines range of 12 to 36 months. Again, we disagree.

A trial court must ordinarily impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A court may not depart from the guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). A reason for departure is substantial and compelling where it is "objective and verifiable" and "of

considerable worth in determining the length of the sentence and . . . keenly or irresistibly grab[s] the court’s attention.” *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A reason is “objective and verifiable” where “the facts to be considered by the court [are] actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and [are] capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). “The requirement that the trial court base its decision on objective and verifiable facts” does “not preclude the court from drawing inferences about defendant’s behavior from objective evidence.” *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008). Further, a departure from the guidelines range must be proportionate to the seriousness of the defendant’s conduct and his criminal history. *Smith*, 482 Mich at 300, 305.

In this case, the trial court articulated several factors that are objective and verifiable, and the court did not err by finding that the factors amounted to substantial and compelling reasons to depart from the guidelines range. The trial court observed that defendant’s criminal record revealed a specific, objective pattern of violent conduct toward women. Although the guidelines took into account defendant’s criminal record, they did not account for the fact that defendant’s three felony convictions all involved violence directed toward women, including in this case, which the court described as “[not] simply a destruction of personal property case.” Defendant destroyed the female victim’s car in her presence for the purpose of intimidating and frightening her. The facts on which the trial court relied for its conclusion are external to the court’s mind and are capable of being confirmed. Further, the fact that this offense, like defendant’s prior criminal offenses, involved a continuing pattern of violence toward women was of considerable worth in determining an appropriate sentence. The trial court properly determined that the guidelines did not adequately reflect defendant’s specific pattern of violence toward women and that this factor constituted a substantial and compelling reason to depart from the sentencing guidelines range.

Also, as noted by the trial court, although defendant’s prior and current convictions were accounted for by the guidelines, the factors did not adequately reflect defendant’s total criminal history. The court recognized the “short amount of time” between defendant’s recurring criminal conduct, which is both objective and verifiable. In addition, as articulated by the trial court, defendant was “given plenty of opportunity to correct his behavior” while on probation, and the guidelines did not adequately reflect defendant’s failed attempts at rehabilitation. The court explained that defendant had failed to participate in court-ordered counseling, was continued on probation in February 2011 “despite the fact that he had not participated in anger management,” and that the current offense occurred “about six weeks later.” A defendant’s failure to rehabilitate himself when given the opportunity to do so is an objective and verifiable factor and is a substantial and compelling reason to support an upward departure. *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004).

In addition, the trial court found that the guidelines, as scored for MDOP only, gave no weight to the exceptional nature of the assault-and-battery misdemeanor convictions in this case. The court noted the objective and verifiable facts that defendant’s assault-and-battery offenses were actually assaultive misdemeanors, as opposed to non-assaultive, involved police officers, and necessitated the deployment of a Taser “to get him under control.” In explaining the significance of the fact that no weight was given to these particular assaultive misdemeanors, the court noted that had defendant been convicted of even another felony offense against property,

he would have received 10 points for PRV 7. The court further found that if defendant's assaultive conduct could have been scored, defendant would have received points under OV 3 (bodily injury to a victim) for the injuries to the officers, MCL 777.33, and under OV 9 (two or more victims placed in danger), MCL 777.39. We discern no clear error in the trial court's factual determinations here. The trial court properly concluded that the guidelines did not account for the defendant's assaultive conduct toward the officers in this case, which was of considerable worth in determining the length of the sentence.

Even when a departure is warranted, "a trial court must justify why it chose the particular degree of departure." *Smith*, 482 Mich at 318. Here, the trial court expressly acknowledged that it was required to impose a sentence that was proportional to the offense and the offender. It gave valid reasons for a departure from the guidelines and it considered that the guidelines were only scored for defendant's MDOP conviction. It also correctly determined that if certain offense variables, OV 3 and OV 9, had been scored to reflect defendant's conduct for the separate assault offenses, defendant would have been subject to a minimum guidelines range of 14 to 43 months. The trial court then explained that this higher range still did not adequately account for the additional factors, and specifically noted that "there's nothing in the guidelines that accounts for the fact that all three of these offenses were crimes against women." The court explained its position and accurately referred to facts in the record, and concluded that the imposed sentence, 60 to 120 months, was more proportionate than one within the guidelines, considering the circumstances of the case and defendant's criminal record. The extent of the departure did not result in a disproportionate sentence and the trial court did not abuse its discretion. We find no error requiring resentencing.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly